No. 78-572

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES PAROLE COMMISSION, ET AL., PETITIONERS

v.

JOHN M. GERAGHTY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM FOR PETITIONERS

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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1. Respondent asserts "that there continues to be a live controversy between the unnamed members of the putative class and the Parole Commission" (Br. in Opp. 10). In an effort to preserve this "live controversy," respondent has filed in this Court a motion to substitute additional parties plaintiff or to permit intervention of five alleged members of the putative class.[1]

As a general matter, we do not oppose the substitution or intervention of any of the proposed intervenors who would be proper parties to the litigation if the case were not moot. Because Harry Cardillo, James Rust and James Taylor appear to possess claims of the type initially presented by respondent in this lawsuit, we do not object

[1]Respondent has filed a similar motion in the district court (Br. in Opp. 10 n.14).

to their participation in this case.[2] Even if substitution or intervention should be granted, however, the question of mootness presented in our petition for a writ of certiorari still would require resolution by this Court. The question would remain whether the addition, at this late date, of parties with live claims could recreate jurisdiction in a case where the claim of the individual litigant became moot and class action certification had been denied before the court of appeals' decision.

2. We take issue with respondent's contention (Br. in Opp. 11-12) that this Court's decisions in *Coopers & Lybrand* v. *Livesay*, No. 76-1836 (June 21, 1978), and *Gardner* v. *Westinghouse Broadcasting Co.*, No. 77-560 (June 21, 1978), support the ruling of the court of appeals in this case. Those cases hold that a district court's order denying class action certification is not appealable until after final judgment, unless the district court has certified its order for interlocutory review pursuant to 28 U.S.C. 1292(b). Nothing in *Coopers & Lybrand* or *Gardner* suggests that a named plaintiff such as respondent may appeal the denial of class action certification after his individual claim has become moot.

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[2]We do, however, oppose the addition of Millard V. Hubbard and David Gillis as parties plaintiff or intervenors. According to information contained in respondent's motion in the district court (see note 1, *supra*), Hubbard was sentenced by a federal district judge in the Northern District of Illinois in September 1972 to 10 years' imprisonment. But Hubbard is not yet serving his federal sentence. Instead, he is serving a state sentence previously imposed by an Illinois court. He is thus not currently subject to the federal parole authority and it does not appear that he soon will be. His challenge to the operation of the federal parole system therefore lacks ripeness, and his motion for intervention should be denied.

Gillis is incarcerated at a federal correctional institution in North Carolina. Since this case has never been certified as a nationwide class action (or even as a local class action), the addition of Gillis to this action would create unnecessary practical problems. See *Starnes* v. *McGuire*, 512 F. 2d 918, 929-931 (D.C. Cir. 1974).

3. Respondent also asserts (Br. in Opp. 13-16) that there is a factual dispute between the parties concerning the development and function of the Parole Commission's Guidelines and that a hearing is necessary to resolve this alleged dispute before this Court may review the court of appeals' determination concerning the validity of the Commission's Guidelines. We disagree.

a. As we have pointed out (Pet. 11-12, 23), the Commission concedes that it does not consider the length of a prisoner's sentence in making parole decisions under the Guidelines. Because there is no dispute about this, there is no need for a hearing. The question whether the Guidelines conflict with the Parole Commission and Reorganization Act because they do not take sentence length into account (Pet. 22-28) is thus squarely presented by this case.

b. In support of the contention that the Guidelines violate the Ex Post Facto Clause of the Constitution, respondent asserts (Br. in Opp. 15) that the customary release dates under the Guidelines "bear no relation to the 'customary length of imprisonment' served prior to adoption of the guidelines." The history and development of the Guidelines has been well documented (Pet. 25 n.19).[3] None of the sources that describe the formulation of the Guidelines supports respondent's assertion. Indeed, it has been reported by those involved in the establishment of the Guidelines that one of the principal factors used in determining appropriate customary release dates was the customary parole practice for various offender categories prior to the adoption of the Guidelines. See Gottfredson, Hoffman, Sigler & Wilkins, *Making*

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[3]See also pages 27-31 and 50-61 of our brief in *Bonanno* v. *United States*, No. 77-1665, and *United States* v. *Addonizio*, No. 78-156, cert. granted (Dec. 11, 1978). We have furnished copies of this brief to counsel for respondent.

Paroling Policy Explicit, 21 Crime & Delinquency 34, 38-39 (1975). As respondent himself alleged in his complaint (C.A. App. A13, para. 42), the Guideline' release dates are derived in large measure from previous parole practice.[4]

Moreover, even if the customary parole date for some offender categories has been lengthened since the adoption of the Guidelines, that would not establish any violation of the Ex Post, Facto Clause. The question whether changes in paroling policy could violate the Clause by increasing the average time served on unquestionably lawful sentences is entirely a matter of constitutional law. It can be resolved without further factual inquiry. As we stated in our petition (Pet. 29-30), the Commission, in assigning an offense severity rating, considers the particular circumstances of each case, and it may depart from the Guidelines in the exercise of its discretion. Respondent does not disagree with this position. As the Ninth Circuit recently stated in rejecting the claim that the Guidelines are an invalid ex post facto law (*Rifai* v. *United States Parole Commission*, 586 F. 2d 695, 698 (1978) (citations and footnote omitted)):[5]

> The Commission here was well within established statutory authority when it promulgated the guidelines. * * * The broad standards enunciated by Congress gave the Commission great discretion, and changes in the emphasis or de-emphasis of parole release considerations within the statutory scheme

[4]Although the Commission's answer (C.A. App. A39, para. 42) denied that the customary release dates under the Guidelines were obtained in the precise manner alleged by respondent, it has consistently asserted that the release dates were based to a large extent on prior practice.

[5]The decision in *Rifai* was rendered after our petition in this case was filed. It highlights the importance of resolving the conflict among the circuits presented by the decision in this case.

> were clearly authorized. The guidelines, therefore, are merely procedural guideposts, without the characteristics of laws.

For the reasons stated above and in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

WADE H. MCCREE, JR.
Solicitor General

JANUARY 1979